

THE UNITED STATES TRADE REPRESENTATIVE

WASHINGTON

20506

December 2, 1981

The Honorable Gerald E. Shannon  
Charge d'Affaires  
Embassy of Canada  
1746 Massachusetts Ave., N.W.  
Washington, D.C. 20036

Dear Mr. Shannon:

Our two countries have held numerous bilateral consultations at various levels over the past year in which we have expressed deep concern about the operation of the Foreign Investment Review Agency (FIRA), the National Energy Program (NEP), and the Committee on Mega-project Industrial and Regional Benefits (CMIRB). I want to take this opportunity to express my appreciation for the growing understanding shown by your Government over the course of these bilateral consultations, particularly during the October 13 meeting between Secretary Regan and Ministers MacEachen and MacGuigan. In conversations held subsequently, we have discussed the need for us to state our principal areas of specific concern. Thus this letter.

Let me begin by restating the fact that the United States especially welcomes the commitment made by the Government of Canada that there will be no expansion of FIRA's mandate or extension of the policies embodied in the NEP to other sectors. We believe that these pronouncements represent a positive step in meeting some of the concerns of the United States Government as well as some of the concerns held by international investors about trends in Canadian economic policy.

I also want to take this opportunity to express my appreciation for the assurance given by Deputy Minister Johnstone in a recent meeting with my Deputy, David Macdonald, that CMIRB's objective is solely to ensure that Canadian suppliers have a full and fair competitive opportunity to bid on major projects, and not to coerce the project owners/sponsors into sourcing from Canadian firms. However, I want to emphasize that we will be monitoring closely the activities of CMIRB, and would object to the imposition by CMIRB of any requirements that companies report on or justify their use of foreign goods and services or any policies which would prevent firms from making decisions relating to sourcing of purchases on commercial grounds.

- 2 -

As you know, there remain a number of very serious objections on our part to the Canadian Government's current and proposed investment, energy and industrial policies. At various levels, officials of the United States have indicated to Canadian officials the apparent inconsistency of aspects of the FIRA and the NEP with international principles and standards of non-discrimination, equity and liberal trade, to which Canada adheres. While the Canadian Government has decided to limit the expansion of FIRA's responsibilities and the extension of the NEP principles to other sectors, many of our concerns about the current practices and proposals remain.

So far, United States Government action in response to these policies has been limited to consultation, despite great pressures from the private sector and the Congress. We cannot, however, continue simply to discuss matters without substantial movement both on the FIRA and on the NEP. Therefore, as a follow-up to both Secretary Regan's visit to Ottawa last month and the recent budget address, we have agreed in Washington that it could be useful to state clearly in writing our key concerns with the operation of the FIRA and the NEP.

Let me emphasize at the outset that we are not opposed to the Canadianization objective of the NEP and the screening of foreign investment by the FIRA per se. We do not question the sovereign right of Canada in these respects. Our concern is with a number of the policy measures that your Government uses or proposes in order to achieve these goals. Our objective throughout our bilateral consultations has been to seek modification of the methods being employed by your Government in the pursuit of these objectives so that Canadian practice would be in compliance with Canada's international obligations, especially in the GATT and the OECD, and with internationally accepted principles in its treatment of foreign investors.

In view of the legislative timing of C-48, the most pressing of the NEP issues is the "back-in" provision. While we have not completed our legal review of the paper you submitted to us on this subject, this review has proceeded sufficiently to raise serious questions in our minds. It is important, therefore, that we have an early opportunity to discuss the provisions of C-48 with a view to modifications which we believe would be necessary to make it consistent with accepted international practice. As you can well understand, success in dealing with this issue may very well affect the chances for success of our consultations on the NEP and the FIRA.

We are seriously concerned about the following discriminatory and inequitable measures associated with the operation of the FIRA and the NEP. The first two practices which concern us are directly trade-related and, we believe, are contrary to Canada's international obligations under the General Agreement on Tariffs and Trade (GATT). The other practices are of equal or greater importance and raise major issues of international policy and principle. It is most important that the first two practices be eliminated, and that the others be eliminated or modified as appropriate.

Foreign Investment Review Agency

1. Trade-related performance requirements, such as undertakings to purchase Canadian goods and services, to reduce imports, or to export specific quantities or percentages of production;
2. Restrictions on foreign firms seeking to distribute their own products in Canada;
3. Undertakings which effectively require the relocation of business activity from other countries to Canada;
4. Undertakings which contain obligations to transfer to Canada assets such as patents without charge, or at less than fair price;
5. Absence of clear guidelines to provide potential foreign investors with a full understanding of FIRA objectives and requirements;
6. Imposition of new performance requirements by FIRA when ownership of a Canadian corporation has simply been transferred from one foreign corporation to another (i.e., the degree of foreign ownership has not increased); approval for ownership transfer in such cases should be required where this is necessary under other provisions of Canadian law, e.g., anti-trust;
7. Lengthy time required for approval or disapproval of FIRA applications after an applicant makes his initial representation;
8. Low FIRA threshold levels for assets and employment, which subject small businesses to the FIRA process.

- 4 -

## National Energy Program

### A. Back-in Proposal

1. Absence of provisions that grandfather or exempt all holders of exploration agreements, permits or leases which have already established the existence of commercially significant quantities of oil or gas, or have undertaken significant exploration expenditures, or have leases in which PetroCanada already has a 25 percent or larger interest;
2. Absence of payments proportionate to the asset value of the relinquished holdings, or to an equitable portion of the future revenues which firms took risks to earn;

### B. Petroleum Incentives Payments

1. Discrimination against foreign firms in the Petroleum Incentives Program;
2. The potential for highly discriminatory, restrictive and uncertain implementation of control criteria in allocating PIP grants;

### C. Production on Canada Lands

- I. Requirement of fifty percent Canadian ownership and control for production on Canada Lands; and

### D. Gas Policy

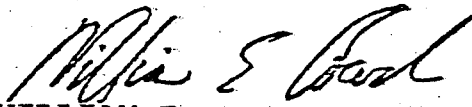
- I. Requirement that Canadian ownership be considered in obtaining access to both natural gas export licenses and Natural Gas Bank benefits.

I have discussed these issues with Secretaries Haig, Regan and Baldrige, who share my belief that it is essential to resolve these issues if we are to arrive at a mutually acceptable resolution of our differences. Given the growing pressures

- 5 -

within the United States for a response to the problems raised by the above issues, I would hope that your Government would be in a position to respond to the points raised at the earliest possible date.

Very truly yours,

  
WILLIAM E. BROCK

WEB:ble